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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43424
Plaintiff-Respondent,)	
)	Twin Falls County Case No.
v.)	CR-2014-8373
)	
TONY TOMAS CUELLAR,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Cuellar failed to establish that the district court abused its discretion, either by imposing concurrent unified sentences of seven years, with two years fixed, upon the jury's verdict finding him guilty of two counts of trafficking in marijuana and one count of conspiracy to traffic in marijuana, or by denying his Rule 35 motion for reduction of his sentences?

Cuellar Has Failed To Establish That The District Court Abused Its Sentencing Discretion

A jury found Cuellar guilty of two counts of trafficking in marijuana (one pound or more, but less than five pounds) and one count of conspiracy to traffic in marijuana (one

pound or more, but less than five pounds), and the district court imposed concurrent unified sentences of seven years, with two years fixed. (R., pp.383-88.) Cuellar filed a notice of appeal timely from the judgment of conviction. (R., pp.400-03.) He also filed a timely Rule 35 motion for reduction of his sentences, which the district court denied. (R., pp.419-30, 436-40.)

Cuellar asserts his sentences are excessive in light of his education and employment history, support in the community, purported remorse, and because the instant offenses are his first three felony convictions. (Appellant's brief, pp.3-5.) The record supports the sentences imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The penalty for both trafficking in marijuana (one pound or more, but less than five pounds) and for conspiracy to traffic in marijuana (one pound or more, but less than five pounds) is a mandatory minimum fixed term of one year, up to 15 years in prison. I.C. §§ 18-1701, 37-2732B(a)(1)(A), -2732B(a)(1)(D). The district court imposed concurrent unified sentences of seven years, with two years fixed, for each of the three counts, which fall well within the statutory guidelines. (R., pp.383-88.) At sentencing, the state addressed the serious and calculated nature of the offenses, Cuellar's failure to accept responsibility for his crimes, the need for punishment and deterrence, and the risk such crimes present to the community. (6/6/15 Tr., p.780, L.16 – p.785, L.5 (Appendix A).) The district court subsequently articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Cuellar's sentences. (6/6/15 Tr., p.791, L.13 – p.799, L.1 (Appendix B).) The state submits that Cuellar has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

Cuellar next asserts that the district court abused its discretion by denying his Rule 35 motion for reduction of his sentences in light of his reiterated "desire to better himself upon his release," positive employment history, support in the community, and because "his actions negatively affected his family." (Appellant's brief, pp.5-6.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Cuellar must "show that the sentence is excessive in light of new

or additional information subsequently provided to the district court in support of the Rule 35 motion.” Id. Cuellar has failed to satisfy his burden.

Cuellar provided no new information in support of his Rule 35 motion. (R., pp.419-30.) Information with respect to Cuellar’s “desire to better himself upon his release,” positive employment history, support in the community, and the effect of his incarceration on his family was before the district court at the time of sentencing. (See PSI, pp.7, 9-10, 12, 14-15; 6/6/15 Tr., p.785, Ls.10-11; p.786, Ls.1-15; p.788, Ls.8-12; p.790, L.18 – p.791, L.11.) Indeed, in its order denying Cuellar’s Rule 35 motion, the district court stated:

Although the defendant highlights many factors weighing in his favor, these factors – his continuing education, work responsibilities, and familial obligations – were already considered by the Court at the time sentence was imposed. The defendant has not presented, in conjunction with this motion, any evidence that was not considered by the Court at the time of the sentencing hearing.

(R., p.438.) Because Cuellar presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentences were excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court’s order denying his Rule 35 motion.

Conclusion

The state respectfully requests this Court to affirm Cuellar's convictions and sentences and the district court's order denying Cuellar's Rule 35 motion for reduction of his sentences.

DATED this 26th day of May, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of May, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JASON C. PINTLER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

<p>1 THE COURT: Mr. Lothspeich, any objection to 2 those? 3 MR. LOTHSPPEICH: No, Your Honor. 4 THE COURT: All right. And was the text 5 messages -- I think those were admitted previously, 6 correct? 7 MR. HATCH: They were, Your Honor. 8 THE COURT: Okay. And is there going to be any 9 preliminary evidence or statements from the defense? 10 MR. LOTHSPPEICH: Just argument, Your Honor. 11 THE COURT: All right. Anything else preliminary 12 then? 13 MR. HATCH: No, Your Honor. 14 THE COURT: Okay. Recommendations from the 15 state. 16 MR. HATCH: If it please the court, Your Honor, I 17 expect that when the defense presents their argument today 18 they're going to ask the court to take into consideration 19 that the defendant is an industrious, intelligent, 20 academically successful young man who while going to 21 college provided well for his children by working as a CNA. 22 They will point out how he has a minimal record, he's well 23 liked by his teachers and his employers and others in the 24 community, and while he has some history of substance 25 abuse, he does not appear to have serious addiction issues.</p> <p style="text-align: center;">780</p>	<p>1 And all of that is 100 percent true and all of 2 this 100 percent cuts against him. This is not a case of 3 an addict who sold drugs to support his habit or out of 4 desperation or lack of other resources. If his parents are 5 to be believed, this defendant was raised in a good home, 6 with good values and provided with guidance and love. 7 Something that cannot be said for most of the people who 8 appear before this court convicted of similar crimes. 9 Most of those people come from difficult and 10 often terrible or even tragic circumstances. That tells me 11 that in engaging in this enterprise Mr. Cuellar did sell 12 willfully and with deliberation and premeditation and for 13 the sole purpose of engaging in a criminal enterprise to 14 make an illicit income. Greed was Mr. Cuellar's sole 15 motivation. 16 That while he may not have been caught before, it 17 is clear from the evidence that was presented to the court 18 and at trial that he was no novice to the drug trade. He 19 was part of a larger criminal group who dealt significant 20 quantities of controlled substances and who operated in a 21 cunning and sophisticated manner. 22 What's worse is he got on the stand and perjured 23 himself in an attempt to avoid the consequences of his 24 actions. He could have stood silent, as was his right, 25 with no fear of retribution for that fact, but instead he</p> <p style="text-align: center;">781</p>
<p>1 lled under oath facts that a jury found beyond a reasonable 2 doubt when they convicted him in spite of his testimony. 3 We all sat here when he got on that stand and testified 4 with sincerity that he wasn't Tony C who planned to go to 5 Jerome and meet his shock collar to get drugs; that he 6 wasn't the one who planned to meet Devin Guardiola, provide 7 him with the marijuana delivered to the undercover officer; 8 and that those weren't his text messages. 9 In addition he continues to minimize his 10 involvement in these crimes in spite of overwhelming 11 evidence to the contrary. His statements in the 12 presentence investigation are as follows: On April 10th, 13 2014 Devin G delivered one pound of marijuana to an 14 undercover detective. He received US currency which he 15 paid me back a debt with. The money was obtained at my 16 house during a search warrant which tied me to the crime, 17 which is corroborated by the testimony of Devin G. On 18 April 23, 2014 Devin G delivered one pound of marijuana to 19 an undercover cop. Devin asked me to give him a ride in 20 order to keep an eye out for him to make sure nothing went 21 wrong. I agreed to give him a ride -- 22 COURT REPORTER: Slow down. 23 MR. HATCH: I picked him up at Jakers and dropped 24 him off at Fawnbrook and I waited at Chevron. While I was 25 waiting --</p> <p style="text-align: center;">782</p>	<p>1 COURT REPORTER: Slow down. 2 MR. HATCH: -- a ride -- arrested -- 3 COURT REPORTER: Slow down. Start over with that 4 sentence. 5 MR. HATCH: Since I gave him a ride and in turn 6 aided in the delivery of one pound of marijuana I was 7 charged with the crime of trafficking and conspiracy. 8 Neither probation nor a retained jurisdiction are 9 options in this case. The only question then is what term 10 of imprisonment this defendant should face. As such Idaho 11 Code 19-2521 offers no help as its purpose is only to guide 12 the court in the choice between community supervision or 13 prison. In State v. Tuhill the court stated: Unlike the 14 choice between probation and confinement the determination 15 of sentencing is not guided by statutory criteria except on 16 maximum term. The court went on to state that 17 reasonableness is the guiding principle and set forth four 18 sentencing objectives to guide the court in obtaining a 19 reasonable sentence. Those objectives are the good order 20 and protection of society; deterrence of the individual in 21 the public generally; possibility of rehabilitation; and 22 punishment or retribution for wrongdoing, with the good 23 order of protection of society as the overriding goal. 24 Each of these goals are best served by a lengthy 25 sentence in custody with the Idaho Department of</p> <p style="text-align: center;">783</p>

<p>1 Corrections in this case. This defendant is deeply 2 involved in the marijuana trade, has connections such that 3 he could obtain at least a pound of marijuana and easily 4 and possibly as much as five pounds based on the final 5 agreed upon transaction in this case.</p> <p>6 A significant sentence would not only serve as 7 deterrence to him, but also for those unnamed individuals 8 he conspired with. He is an intelligent, educated young 9 man and given the willful, deliberate and calculated nature 10 of his crimes, coupled with his ongoing refusal to 11 acknowledge culpability in this case give us little reason 12 to believe that he is amenable to rehabilitation.</p> <p>13 The irony of the fact that his college degree is 14 in criminal justice is not lost on the state and only 15 serves to add to the calculated nature of his actions and 16 his contempt for the laws of the state of Idaho.</p> <p>17 Given all the facts of this case and the 18 defendant's utter lack of remorse it's clear that 19 punishment for punishment's sake and the good order and 20 protection of society requires a sentence of three years 21 fixed, seven years indeterminate, for a total of ten years 22 to serve on each count, to run concurrently. Three years 23 fixed, one year for each of these counts, to serve as 24 punishment for his crimes, each of which require a minimum 25 of one year in prison.</p> <p style="text-align: center;">784</p>	<p>1 And finally the good order and protection of 2 society, the defendant's lack of amenability to 3 rehabilitation require that this defendant be monitored for 4 years to come to make certain he does not once again choose 5 to engage in a criminal enterprise.</p> <p>6 Thank you, Your Honor.</p> <p>7 THE COURT: And on behalf of the defendant.</p> <p>8 MR. LOTHSPREICH: Your Honor, the court's well 9 aware of all of the evidence in this case. And as 10 indicated by Mr. Hatch, my client is a hard working, 11 exemplary employee.</p> <p>12 And I would like to also express appreciation for 13 the consideration given by the state and the court to delay 14 sentencing. My client did graduate last week from the 15 College of Southern Idaho.</p> <p>16 As indicated in the Presentence Report, when my 17 client was in between his junior and senior year in high 18 school he learned he was going to be a father. He 19 completed high school with distinction, and in fact was 20 awarded scholarships at the College of Idaho totalling in 21 excess of \$60,000, which would have launched him into a 22 very favorable position to go to a very solid academic 23 school and launch perhaps his career in the law, as he 24 indicated at trial. But he instead chose to stay close to 25 home, close to his son, attend the College of Southern</p> <p style="text-align: center;">785</p>
<p>1 Idaho and work full time. As indicated at Bridgeview 2 Estates by his supervisor, he was an exemplary employee. 3 He was beloved by the elderly patients there.</p> <p>4 That job was washed out with the charges in this 5 case and after that he went to work for Independent Meats 6 on the sanitation crew at night cleaning up butchered pig 7 remains, still going to school after the trial in this 8 case, graduating with distinction.</p> <p>9 Your Honor, he is a dutiful father, he also now 10 has a daughter with his fiancée Caitlyn Neville, and has by 11 his choice been close to his son and daughter all of their 12 lives thus far. Whatever sentence the court orders in this 13 case my client will now be separated from his children for 14 a minimum of a year. He knows that. That's a serious 15 consequence for any young father or for anyone.</p> <p>16 You know, the state made reference to 19-2521, 17 and it is not something that the court can weigh in this 18 case, but taking a look at subsection 2, the grounds for 19 the court to consider for probation, I think they do bear 20 some weight for the court to consider in the ultimate 21 sentence. Subsection eight, the defendant's criminal 22 conduct neither caused nor threatened harm.</p> <p>23 Now drug dealing has inherent risks, but 24 marijuana arguably doesn't have the same risk as 25 methamphetamine. Anybody involved in the court system for</p> <p style="text-align: center;">786</p>	<p>1 any period of time sees a huge distinction between illicit 2 drugs, marijuana, methamphetamine. People that use 3 methamphetamine often times die; people using marijuana 4 often times don't. In fact our neighboring states have 5 made it a new cash crop: Oregon, Washington and Colorado.</p> <p>6 And I'm not saying that Idaho's trafficking 7 statute is in any way invalid. It's the law of the land. 8 But when you weigh the effect and harm, it's miles apart 9 from methamphetamine, from cocaine and other illicit drugs.</p> <p>10 Under subsection b, the defendant did not contemplate that 11 his criminal conduct would cause or threaten harm. Kind of 12 the same thing. How bad's marijuana? Well, he's facing 13 the consequence. But what is the societal harm? I think 14 the court needs to see the distinction between marijuana 15 and hard, illicit drugs.</p> <p>16 Subsection c: The defendant acted under 17 provocation is inapplicable. Subsection d: There were 18 substantial grounds tending to excuse and justify his 19 conduct, not applicable. Subsection e refers to a victim. 20 There's no victim here. It's a victimless crime other than 21 society in general. It refers to a victim, that's 22 inapplicable. Subsection g: The defendant has no history 23 of prior delinquency or criminal activity, and my client 24 doesn't. He's got a clean record.</p> <p>25 Subsection h: The defendant's criminal conduct</p> <p style="text-align: center;">787</p>

APPENDIX B

<p>1 was a result of circumstances unlikely to recur. We would 2 contend that. And under i: The character and attitude of 3 the defendant indicate that the commission of another crime 4 is unlikely. And I think his character and attitude, as 5 even indicated by the state, is quite good compared to a 6 lot of folks who we deal with in the criminal justice 7 system.</p> <p>8 Now the court can look at the character and clean 9 record and family of Cuellar and try to say, well, he 10 should have known better, and he should have; but it also 11 shows stability and support that other folks don't have 12 whenever they are paroled.</p> <p>13 And Mr. Cuellar's commitment to his fiance and 14 two children is exemplary. Even with this black cloud of a 15 sentence and the clear knowledge that "I'm going to prison" 16 hovering about him for months, he still worked and he still 17 went to school and he finished with honors. That should 18 give the court some reassurance that he's going to try to 19 fly straight. He's out on bond, he could have bailed, 20 Thank God he did not. He held in there and he's here 21 today.</p> <p>22 So under a review of title 19-2521, if we weren't 23 dealing with the amount of drugs in this case, the court 24 certainly could have ample grounds to exercise your 25 discretion for probation.</p> <p style="text-align: center;">788</p>	<p>1 In this case, Your Honor, because of the 2 restitution outstanding, because of his inability to pay 3 any other amounts, we are requesting the minimum fine in 4 this case of \$5000. That's going to be a mountain to climb 5 when he's released in light of these other situations.</p> <p>6 We're requesting that the court consider a lesser 7 sentence than what the state's recommending concurrently, 8 In viewing the goals of sentencing, deterrence, 9 retribution, rehabilitation and the good order and 10 protection of society, a lengthy prison term of a year is 11 retribution. It does serve the purposes of deterrence.</p> <p>12 In fact the legislature, in passing the 13 trafficking statutes, sole goal in making minimum mandatory 14 sentences was a clear expression of general and specific 15 deterrence, taking it out of Your Honor's hands and saying 16 folks that deal with a pound of marijuana are going to 17 prison. Why would the legislature do that but for 18 deterrence? That alone serves the purpose of deterrence 19 and it serves the purpose of retribution. My client's 20 never been away from his family and now he will for a very 21 long time. That is punishment.</p> <p>22 And for rehabilitative purposes there's nothing 23 in the PSI indicating that my client has a chronic drug 24 problem. I'm not sure what prison will do for my client 25 for purposes of rehabilitation, but the minimum sentence in</p> <p style="text-align: center;">789</p>
<p>1 this case has its own rehabilitative purposes.</p> <p>2 Your Honor, this has been a very long process for 3 my client. It was a very hard-fought trial. And my client 4 is here today to take his medicine and I think a year on 5 both counts concurrently is a severe punishment. We are 6 requesting that the court order a one to five year 7 sentence, with one year fixed, four years indeterminate and 8 that those be concurrent. I think that that does provide 9 for the good order and protection of society since it sends 10 a clear message: Don't argue the benefits, don't argue the 11 medicinal values, don't even argue about whether or not 12 people should smoke dope, it's illegal in Idaho and if you 13 mess with it you go to prison for a year, end of story.</p> <p>14 And a year is a long time, Your Honor.</p> <p>15 Thank you.</p> <p>16 THE COURT: Anything you wish to say on your own 17 behalf?</p> <p>18 MR. CUELLAR: I would like to apologize for the 19 decisions that I have made, and it is a big life lesson 20 that I'm going to regret forever because I have been part 21 of my kid's lives since they were born. And I do have a 22 fiance now and I'm going to be gone for at least a year, 23 maybe longer, and now I'm going to have to worry about 24 who's going to take care of my kids and watch out for my 25 fiance. And she has to do all the work and it's a big</p> <p style="text-align: center;">790</p>	<p>1 regret because now I'm going to lose time that I'm never 2 going to get back and kids grow up fast and learn new 3 things every day.</p> <p>4 And I'm not going to let it bring me down. I am 5 in trouble and I'm going to go for however long, but I'm 6 not going to let it bring me down. I am going to stay 7 positive. I'm going to get out and get back to work right 8 away and take care of my kids as best I can and get back in 9 school again and pursue a different educational route. But 10 I will come out of this and be positive. I'm a good person 11 and I will do good for my family in the future.</p> <p>12 Thank you, Your Honor.</p> <p>13 THE COURT: Well, both the state and the defense 14 have said things I completely agree with. And this is a 15 difficult case for the reasons I think both parties have 16 talked about. There's a minimum mandatory, so the court's 17 discretion is limited to some extent, but there is still 18 discretion in terms of how much to give, whether more than 19 the minimum mandatory, whether or not the maximum, how much 20 determine, how much indeterminate, those are all factors 21 to consider in light of the factors the court should 22 consider at sentencing.</p> <p>23 And as Mr. Lothspeich said, I don't recall a 24 sentencing being continued for a college graduation. I 25 mean, that doesn't happen in the system. I'm sure it has,</p> <p style="text-align: center;">791</p>

<p>1 but it's rare.</p> <p>2 So, Mr. Cuellar, your work history is good -- I</p> <p>3 mean your education history is good. Your employers like</p> <p>4 you. You work very well at your jobs. You've worked hard</p> <p>5 when you were let go from the nursing job and you worked a</p> <p>6 difficult and unpleasant job in order to support yourself.</p> <p>7 Many defendants don't do that or come close to doing that.</p> <p>8 And those are mitigating factors. Those are</p> <p>9 things I think any court in any case has to consider for</p> <p>10 various reasons. And the PSI indicates -- I noted and I</p> <p>11 was struck by it -- that you worked until it came close to</p> <p>12 sentencing and then you quit, and I think on good terms,</p> <p>13 when you knew, Hey, I've got to face a minimum mandatory</p> <p>14 sentence and you know what was coming down the pike. And</p> <p>15 you handled that well and I think that speaks well of your</p> <p>16 ability to function in society to support yourself, support</p> <p>17 your family, if you choose to.</p> <p>18 On the other hand a lot of what the state said is</p> <p>19 on point as well, that this is not a minor case. There was</p> <p>20 a lot of marijuana involved. There was the conviction for</p> <p>21 conspiracy. We're dealing with substantial amounts of</p> <p>22 marijuana. We're dealing with something that is a serious</p> <p>23 enough crime that there's a minimum mandatory. There</p> <p>24 aren't that many minimum mandatories in Idaho law. There</p> <p>25 just aren't. Even on some crimes that are more severe</p> <p style="text-align: center;">792</p>	<p>1 we're not faced with that.</p> <p>2 And I think it's important to -- One thing I'll</p> <p>3 say when I'm making these comments -- I think it's</p> <p>4 important -- I'm not going to apologize for the legislature</p> <p>5 or the law or the jury. That is the law. There's a</p> <p>6 minimum. There's a minimum there for a reason.</p> <p>7 I agree, as defense counsel argued, marijuana is</p> <p>8 not as bad as some other drugs, perhaps, but it's already</p> <p>9 taken into account in the minimum mandatory sentence: That</p> <p>10 they have different weights, but the minimum mandatory</p> <p>11 sentences for methamphetamine, cocaine, heroin, those</p> <p>12 things are higher and the maximums are greater and the</p> <p>13 fines are greater. So the legislature has implicitly said</p> <p>14 that very thing: That, no, marijuana dealing in</p> <p>15 substantial quantities is not as bad as dealing in</p> <p>16 methamphetamine in substantial quantities, but it's still</p> <p>17 not an offense we can just give you a CAP rider or suspend</p> <p>18 the sentence, as happens many, many times in the courts for</p> <p>19 even delivery of some quantity of marijuana. You can't do</p> <p>20 that here and there's good reason for it.</p> <p>21 And so that's not really the factor. I think the</p> <p>22 factors are, as always, the good order and protection of</p> <p>23 society. There's also a factor which is mentioned in the</p> <p>24 case law about protection of the public interest. And this</p> <p>25 falls in that to some extent. The protection of the public</p> <p style="text-align: center;">793</p>
<p>1 interest is supposed to be considered and it requires that</p> <p>2 the nature of the offense is related to that. I mean the</p> <p>3 nature of the offense and the protection of the public</p> <p>4 interests are related. The severity of the crime</p> <p>5 corresponds to the protection required.</p> <p>6 So it's not just being safe from future crimes,</p> <p>7 but there is a punishment component aside from everything</p> <p>8 else and the legislature has expressed that here with a</p> <p>9 minimum mandatory that does that.</p> <p>10 And I think the factors in 19-2521 are still</p> <p>11 appropriate to look at because they're factors that are</p> <p>12 common sense factors in weighing aggravating and mitigating</p> <p>13 evidence or factors that a court really would consider,</p> <p>14 whether they're listed in a statute or not. What treatment</p> <p>15 or correction is required; would a lesser sanction</p> <p>16 deprecate the serious nature of the crime; how much do we</p> <p>17 have to punish and deter the defendant; how much harm the</p> <p>18 crime caused. All those things are contemplated in those</p> <p>19 factors. So I'm aware of those factors and I think they're</p> <p>20 appropriate to consider.</p> <p>21 And some of those mitigating factors, as we've</p> <p>22 mentioned: There's not a significant prior criminal</p> <p>23 history. A couple misdemeanors, I guess: The racing on</p> <p>24 the roadway and I think the paraphernalia. It's not a</p> <p>25 significant record.</p> <p style="text-align: center;">794</p>	<p>1 What I mentioned about work and supporting</p> <p>2 yourself and your family is present. And you've taken --</p> <p>3 it's an interesting case in that you testified and you were</p> <p>4 convicted. So the state points out correctly that that's a</p> <p>5 difficult thing to face at sentencing, but you've taken</p> <p>6 responsibility and you know what you're facing and</p> <p>7 basically have been straight forward about it, whether it's</p> <p>8 the way you didn't quit your job, or showed up and wanted</p> <p>9 to finish school and did. You're still here, you know.</p> <p>10 You're supposed to show up for sentencing, but you handled</p> <p>11 it well in light of all the circumstances. I think that</p> <p>12 shows -- and your prior life. The way you've gone about</p> <p>13 living your life and your record, you can conform your</p> <p>14 conduct to the law. You can.</p> <p>15 But there's the Catch 22, as the state pointed</p> <p>16 out. That means you're not just somebody who needs some</p> <p>17 drug treatment or you kind of made a mistake or there are</p> <p>18 factors outside your control. And those can be seen as</p> <p>19 aggravating factors. If you go out and commit a crime</p> <p>20 intentionally for profit, that's an aggravating factor,</p> <p>21 versus somebody just trying to scratch through life or who</p> <p>22 doesn't have -- who's not habilitated, let alone</p> <p>23 rehabilitated. So that cuts both ways, as the state</p> <p>24 indicates.</p> <p>25 So I think in the final analysis we have to look</p> <p style="text-align: center;">795</p>

<p>1 at the seriousness of the crime, the number of counts, the 2 fact that it couldn't have been just a mistake or by 3 accident.</p> <p>4 On the other hand, punishment could well work 5 here because you're smart enough, if you decide you don't 6 like prison, you don't want to go back, and you can 7 therefore conform your conduct to the law and not cause any 8 problems again. So that is the hope.</p> <p>9 So the question is how to sentence you 10 accordingly. There's an idea within the law of sentencing 11 that we shouldn't sentence to more than is necessary to 12 accomplish those goals, whatever the sentence is. And just 13 picking a number of ten years would work. You don't need 14 20. So that's I think a factor to consider here, is this 15 is a case that is appropriate to consider punishment, it's 16 appropriate to consider protection of the public interest, 17 and it's appropriate to consider deterrence to you on this 18 case and in the future and to society generally. And to 19 some extent I think that what the state mentioned is an 20 appropriate factor to consider in terms of the length of an 21 indeterminate sentence, to give you some extra incentive, 22 assuming parole, where you could be supervised or managed 23 and have that transition so you would have that extra 24 deterrence and society would have that protection in place.</p> <p>25 And that's the factor I've been considering</p> <p>796</p>	<p>1 because -- and I don't know -- I can't assume one way or 2 another what the parole department will do. That will 3 depend on you, it will depend on how they perceive your 4 denial of the guilt, how well you do there, all kinds of 5 things that we don't know today. And so I can neither 6 assume you're just going to top out and I can't assume 7 you'll get out day one either. So I think the court has to 8 consider that either of those things could happen.</p> <p>9 In the exercise of discretion -- first the easier 10 things: Court costs. Standard court costs on each count 11 all emergency surcharges and PSI fees. I will fine you the 12 minimum mandatory on each count, the \$5000. I don't think 13 a higher fine would serve the purposes of sentencing in 14 light of all the circumstances. You do have to get a DNA 15 and right thumbprint impression and I'll order \$100 16 restitution for that payable to the State Lab. We're 17 holding the other restitution open for a reasonable period 18 of time. You can figure on a couple more hundred to the 19 State Lab testing and the rest counsel will have to look 20 into and determine the amount. But you can figure on an 21 amount for police salaries and costs of investigation, 22 which obviously are present. However they end up getting 23 apportioned there are those costs because this was a case 24 with some extensive investigation and work put into it.</p> <p>25 That's clear.</p> <p>797</p>
<p>1 And then on each count, these will all run 2 concurrent. So I am sentencing the counts concurrent. So 3 the two trafficking and conspiracy to traffic are the same 4 and it will be a unified sentence of seven years, 5 comprising two years fixed, plus five years indeterminate, 6 and that will be concurrent on each count.</p> <p>7 And I'll indicate the specific reason for my 8 breakdown of the sentence. I think the minimum mandatory 9 of one year -- I don't view this case as a minimum 10 mandatory because the minimum mandatory is just that: 11 That -- it's hard to say minimum one pound on one time you 12 had in your possession you get a year. This was more than 13 that and so I don't think the absolute minimum mandatory is 14 the right sentence.</p> <p>15 On the other hand, I think some mitigating 16 factors are present such that setting a very long 17 determinate sentence would not be appropriate. That you 18 may not need more incarceration than that. And then the 19 indeterminate portion of five years for the total of seven, 20 that will give you -- I think will give the parole 21 commission time to work with, give you incentive if you are 22 released, and in the worse case scenario if you're not I 23 think it's an appropriate maximum. So that's the reasoning 24 for the specific breakdown and that will be concurrent on 25 the first trafficking count and the second trafficking</p> <p>798</p>	<p>1 count and conspiracy to traffic.</p> <p>2 You have 42 days to appeal. If you wish to 3 appeal discuss that with Mr. Lothspeich. He can perfect 4 that for you, including appointment of the state appellate 5 public defender if that is necessary.</p> <p>6 And good luck. You will remanded to the sheriff 7 for transport to the Department of Corrections.</p> <p>8</p> <p>9</p> <p>10 End of transcript on appeal</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>799</p>